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IN THE

Supreme Court of the United States

John M. Lamie,

Petitioner,

v.

United States Trustee.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does 11 U.S.C. 330(a)(1) authorize a court to award fees to a debtor's attorney?

PARTIES TO THE PROCEEDINGS BELOW

In the court of appeals, this matter was captioned *United States Trustee* v. *Equipment Services (In re Equipment Services)*. Equipment Services is a debtor represented by John M. Lamie. Because the issue in this Court is Lamie's right to attorney's fees, and because the United States Trustee objected to the fee award in the proceedings below, they are respectively denominated the petitioner and the respondent in this Court. Equipment Services was identified as a nominal party by the Petition for Certiorari.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW AND JURISDICTION

The opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 290 F.3d 739. The opinions of the district court (Pet. App. 15a-27a) and bankruptcy court (*id.* 28a-44a) are unpublished. The court of appeals issued its opinion on May 31, 2002, and denied rehearing *en banc* on August 5, 2002. This Court granted certiorari on March 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced *infra* at 1a-5a.

STATEMENT

For more than a century, Congress has authorized bankruptcy courts to use funds of the bankruptcy estate to pay the fees of a debtor's attorney for services that benefit the estate. A divided panel of the Fourth Circuit in this case nonetheless inferred that Congress implicitly reversed course entirely, forbidding such compensation, when it revised and recodified Section 330(a) of the Bankruptcy Code in 1994. The court of appeals rejected the contrary rule endorsed by the leading treatise and adopted by "the majority of courts" (*In re Hasset, Ltd.*, 283 B.R. 376, 381 (Bankr. E.D.N.Y. 2002)), acknowledging that three circuits had reached the opposite conclusion.

1. The Bankruptcy Code imposes an array of duties on a debtor in bankruptcy. For example, the debtor must "file a list of creditors," together with "a schedule of assets and liabilities." 11 U.S.C. 521(1); Bankr. R. 1007(a)(1), (b)(1). The debtor must also take steps to "maximize the value of the estate." *La. World Exposition* v. *Federal Ins. Co.*, 858 F.2d 233, 246 (CA5 1988) (citing *CFTC* v. *Weintraub*, 471 U.S. 343, 352 (1985)). "In addition," whether the debtor is "in

possession" of the estate or instead a trustee has been appointed to represent the estate, the debtor "shall"

> (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order * * *; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate, and (5) file a statement of any change of the debtor's address.

Bankr. R. 4002 ("Duties of Debtor"). See also 11 U.S.C. 521(3), (4) (providing that debtor must "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties," including by "surrender[ing] to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate"). The debtor must also appear at the meeting of creditors to be examined by the trustee and to be advised of the consequences of the proceedings. *Id.* § 341; Bankr. R. 2004. These duties remain ongoing during the course of the proceedings.

Although the debtor thus bears substantial responsibilities, a number of which can generally be competently fulfilled only with legal advice, the debtor lacks funds to pay counsel. The debtor's assets are deemed to be the property of the estate (11 U.S.C. 541), which must be "surrender[ed] for distribution * * * at the time of bankruptcy" (*Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (emphasis omitted)). Any expenditure by the debtor of those funds without permission of the bankruptcy court is forbidden. 11 U.S.C. 549.

To solve this dilemma, Congress has long permitted the debtor's legal fees to be paid from the debtor's estate *to the extent that* they benefit the estate or are necessary to the administration of the case. The Code authorizes the debtor to retain counsel. 11 U.S.C. 329(a). The Code addresses the payment of fees to attorneys and other professionals in the provision at issue in this case, Section 330(a). 11 U.S.C. 330(a). Congress enacted this provision to *increase* the compensation paid to counsel under predecessor provisions of the bankruptcy laws. See 3 Collier on Bankruptcy ¶ 330.LH, at 330-72 (15th ed. 2002).

Subsection 330(a)(1) authorizes the court to award compensation. Subsection (a)(2) gives the Office of the United States Trustee, a division of the Department of Justice, the right to comment on and object to any fee application. Subsection (a)(3) sets forth extensive criteria for the bankruptcy court to evaluate such an objection, including "the nature, the extent, and the value of such services, taking into account all relevant factors." Subsection (a)(4) affirmatively forbids compensation for "unnecessary duplication of services," as well as for "services that were not (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." Fees approved under Section 330 are deemed an "administrative expense" payable from the estate on a priority basis. *Id.* §§ 503(b)(2), 507(a)(1).

Section 503 of the Code contains a separate, more general provision authorizing the use of estate funds to pay for services that benefit the estate. A party such as an attorney may submit "a request for payment of an administrative expense." 11 U.S.C. 503(a). The bankruptcy court, in turn, is directed to allow as legitimate administrative expenses "the actual, necessary costs and expenses of preserving the estate." *Id.* § 503(b)(1)(A).

Sections 330 and 503 are relevant only if the attorney is to be compensated from the property of the estate. They are inapposite to the extent the debtor seeks to pay counsel from

non-estate funds, as when, prior to the commencement of the bankruptcy proceedings, the debtor secures counsel and pays the attorney a particular form of retainer. 11 U.S.C. 329(a). If properly framed, and if permitted under the legal ethics rules of the state in question, the retainer is the property of the *attorney* rather than the property of the *estate*. The bankruptcy court has substantially less control over such a retainer, which is reviewed not under the searching standards of Section 330(a)(3) and (4), *supra*, but instead simply for whether it "exceeds the reasonable value of [the attorney's] services" (*id.* § 329(b)).

2. Congress substantially revised and recodified the fee provisions of Section 330(a) in 1994. The question presented by this case is whether Congress in the 1994 Act implicitly intended to prohibit bankruptcy courts from compensating attorneys even for services beneficial to the estate. The question arises because the statute, as revised, contains an obvious scrivener's error. Section 330(a) contains two conjoined lists that contain irreconcilable references to the debtor's attorney:

> [T]he court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--(A) reasonable compensation for actual, necessary services rendered by *the* trustee, examiner, professional person, or *attorney*.

11 U.S.C. 330(a)(1)(A) (emphasis added). For ease of reference, we will call the former list (which does not refer to the debtor's attorney and contains a grammatical error by omitting the conjunction "or") the "payees list," because it identifies persons who may be paid compensation. We will call the latter list (which does refer to the attorney) the "providers list," because it identifies the parties that provide compensable services.

Prior to the adoption of the current version of Section 330(a) in 1994, both lists referred to the debtor's attorney. The question presented by this case is whether the omission

of the phrase "debtor's attorney" from the payees list in 1994 overcomes the other provisions of the Bankruptcy Code that authorize compensating the debtor's attorney and thus prohibits the payment of fees to the debtor's counsel from the estate, thereby effecting a sea change in bankruptcy law. A divided panel of the Fourth Circuit answered that question in the affirmative. The majority denied that Section 330(a) was at all ambiguous and therefore refused to consider whether the court's holding could be rationalized with other statutory provisions, the purpose of the Code, the legislative history, or past Code practice. The court of appeals thereby parted ways with a majority of courts, which hold that Congress in 1994 did not intend to abrogate the longstanding authority to compensate counsel for services that benefit the bankruptcy estate.

3. Equipment Services, Inc., a mine services company, hired petitioner John M. Lamie, an attorney, to represent the company in its bankruptcy proceedings. Prior to the commencement of the proceedings, the company paid Lamie a $6,000 retainer. Petitioner spent an initial $1,000 to cover the cost of preparing a petition for Chapter 11 reorganization and to pay the $830 filing fee. Petitioner held the remaining $5,000 of the retainer in a client escrow account.

Petitioner filed the petition for relief in December 1998. The bankruptcy court then appointed him counsel for the debtor. Petitioner represented Equipment Services in its Chapter 11 proceeding, earning $1,325 in fees for 10.5 hours of work and incurring $3.85 in expenses. Among other things, petitioner filed an adversary complaint against a creditor relating to equipment held by the debtor in a mine.

When the debtor was unable to secure insurance on the equipment in its custody, the U.S. Trustee successfully moved to have the case converted from a Chapter 11 reorganization to a Chapter 7 liquidation. As in all Chapter 7 cases, the bankruptcy court named a trustee to oversee the liquidation. See 11 U.S.C. 701(a). Over the course of the next several

months, petitioner worked a further 8.1 hours on the case (totaling $1,000 in fees), often under order of the court or at the request of the trustee. The U.S. Trustee does not dispute in this Court that petitioner's services were non-duplicative, necessary to the administration of the case, and beneficial to the bankruptcy estate.[1]

For example, on the date the bankruptcy court converted the case to a Chapter 7 proceeding, March 17, 1999, petitioner wrote to the debtor to explain that the conversion had occurred and to discuss steps the debtor potentially could take to reconvert the case to Chapter 11. The bankruptcy court's conversion order also required "the debtor(s) (or Trustee)" to file a report detailing any debts incurred, or property acquired, by the debtor since the bankruptcy filing. App. 15a; 11 U.S.C. 521(1). In this case like many others, the debtor's counsel (here, petitioner) took responsibility for filing the report (App. 17a-18a) because the newly appointed trustee was not familiar with the debtor's assets and liabilities.

Next, in April 1999, petitioner prepared and filed an amendment to the bankruptcy schedules to reflect a claim filed by an additional creditor. App. 19a-21a. He also distributed a required notice of the "Section 341" creditors meeting. App. 22a; see 11 U.S.C. 341. Petitioner appeared with the debtor at the creditors' meeting. See 11 U.S.C. 341(d) (providing that debtor must be available for examination). Soon thereafter, at the request of the trustee, petitioner held a telephone call regarding the status of the equipment held in the mine. See *id.* § 521(3) (debtor is required to cooperate with trustee).

In December 1999, petitioner appeared at a hearing on the adversary complaint that he had previously filed on behalf of the debtor. Petitioner then wrote to advise the debtor that it

[1] Any properly preserved argument by the U.S. Trustee that petitioner's services were not sufficiently beneficial to qualify for payment under the Code would be left for remand.

was essential to coordinate with the trustee regarding proceedings on the complaint. Petitioner also advised the debtor regarding issues relating to a lien that had the potential to reduce the equipment's value to the estate.

In January 2000, petitioner provided the trustee with the adversary complaint, together with an order substituting the trustee as the plaintiff. App. 25a; see 11 U.S.C. 521(4) (duty to provide materials to trustee). At the trustee's request, petitioner coordinated with the creditor's counsel the exchange of witnesses and exhibits regarding a hearing on the complaint. App. 26a.

In March 2000, once again at the trustee's request, petitioner investigated allegations that the equipment in the mine had been damaged by flooding. App. 27a-28a. Based on that investigation, the trustee requested that petitioner attend a meeting between the trustee, the debtor, and an asset-recovery firm regarding the equipment.

4. Since at least the Bankruptcy Act of 1898, Congress has authorized bankruptcy courts to compensate debtors' attorneys from the assets of the estate in both reorganizations and liquidations. In June 2000, petitioner submitted to the bankruptcy court a request to approve the modest $2,325 in fees he had earned, and $3.85 in expenses he had incurred, throughout the case. Respondent U.S. Trustee, however, opposed that portion of the fee request ($1,000) relating to petitioner's work during the Chapter 7 stage. The U.S. Trustee contended that Section 330(a), as revised and recodified in 1994, forbids the bankruptcy court from awarding such fees because, although the providers list refers to the debtor's attorney, the payees list omits the reference to the debtor's attorney that was included in the pre-1994 version of the statute. See *supra* at 4 (quoting the statute).

The U.S. Trustee did not, however, oppose petitioner's application for the $1,325 in fees for services he provided before the case was converted to Chapter 7. Section 330(a) applies generally to fee requests, including in *both* Chapter 7

and Chapter 11 cases. Nonetheless, the U.S. Trustee took the view, favorable to petitioner, that several Code provisions in combination authorized petitioner to receive fees during the Chapter 11 proceedings not as a *debtor's* attorney but instead as a *trustee's* attorney. A Chapter 11 debtor in possession has the rights of a trustee (*id.* § 1107(a)), including the right under Section 327 of the Code to hire an attorney (*id.* § 327(a)). Section 330(a)'s payees list, in turn, authorizes the bankruptcy court to award fees to "a professional person employed under section 327."

The U.S. Trustee also disputed petitioner's alternative argument that, without regard to Section 330(a), he was entitled to be paid all his fees, including the $1,000 for work during the Chapter 7 proceedings, from the $6,000 pre-petition retainer. The U.S. Trustee acknowledged below that certain types of retainers – so-called "general" or "classic" retainers – become the property of the *attorney* upon payment and thus are not part of the bankruptcy *estate*. The attorney's receipt of such a retainer is accordingly subject to review by the bankruptcy court under Section 329(b) only to determine if it "exceeds the reasonable value of [the attorney's] services" rather than under the more searching standards of Section 330(a)(3) and (4). But the U.S. Trustee argued that the particular retainer paid by Equipment Services to petitioner in this case did not so qualify, but rather remained the property of the estate because it authorized petitioner to draw upon it only as he performed legal services and furthermore obligated petitioner to return to the debtor any balance remaining at the conclusion of the proceedings.

5. The bankruptcy court agreed with the U.S. Trustee's contention that Section 330(a)(1) does not authorize petitioner to receive payment for the fees he earned during the Chapter 7 proceedings. See Pet. App. 32a-38a. The court acknowledged that its interpretation renders Section 330(a)(1) "arguably internally inconsistent with" the statute's providers list, which authorizes payment for services rendered by "the * * * attorney." *Id.* 35a. Further, the court acknowledged

that "the absence of legislative history and a brief review of the syntax of the statute might indicate that" the absence of "attorneys" from the payees list "was inadvertent." *Id.* 36a. But the court found it dispositive that "the current version of 330(a)(1) is the result of a deletion by Congress [of the phrase 'or a debtor's attorney' from the payees list] that resulted in a statute which is clearly at odds with its pre-amendment version." *Id.* 35a.

The bankruptcy court agreed with petitioner, however, that Section 330(a) simply did not govern his fee application because the retainer he had been paid by Equipment Services was his property, not "property of the estate." The court rejected the U.S. Trustee's proposed distinction among types of retainers (Pet. App. 42a), reasoning that "the client cannot retain the benefit of the services being rendered and yet to be rendered by the attorney and at the same time demand a refund of the current unearned balance of the retainer" (*id.* 38a). On the bankruptcy court's view, "[o]nly to the extent that a balance remains in the retainer after all services have been rendered and fees have been allowed under § 329 does the reversionary interest of the debtor in that balance become property of the bankruptcy estate." *Id.*

The bankruptcy court recognized "the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case." Pet. App. 43a. The refusal to award fees altogether, however, would create

> a very powerful disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services to the client in those Chapter 7 cases that were accepted. Particularly in the context of a Chapter 7 corporate debtor without interested, willing, and financially able owners or

> affiliates, the likelihood of payment for post-petition services by the debtor's attorney precluded from relying on his retainer for payment would appear to be doubtful at best.

Id. 42a. The bankruptcy court concluded that the retainer Equipment Services had paid to petitioner was reasonable in light of the services he provided (see 11 U.S.C 329(b)) and accordingly approved the award of all of petitioner's requested fees from it. Pet. App. 43a-44a.

6. The district court affirmed in all respects. Pet. App. 15a-27a. The district court agreed with the bankruptcy court that Section 330(a) does not authorize the award of attorney's fees to a debtor's attorney in light of "the mysterious disappearance from the Bankruptcy Code" of the reference to the debtor's counsel in the payees list. *Id.* 19a. The court acknowledged that "[n]o principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion." *Id.* 22a. Further, "[t]here are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services 'reasonably likely to benefit the debtor's estate.'" *Id.* 24a (quoting 11 U.S.C. 330(a)(4)(A)(ii)(I)). But the court did not deem it "nonsensical" for Congress to have withdrawn the bankruptcy courts' authority to award fees to debtors' attorneys from the property of the estate. *Id.*

The district court nonetheless agreed with the bankruptcy court that Section 330(a) was irrelevant to this case, and that petitioner was entitled to be paid from the pre-petition retainer he received from Equipment Services, because the retainer was petitioner's property, not property of the estate. The district court reasoned that, although "a chapter 7 debtor's attorney may not be entitled under the Bankruptcy Code to compensation from the estate, the debtor is not prohibited from being represented and until such

representation is ended, the debtor–and hence, the debtor's bankruptcy estate–is not entitled to a refund." Pet. App. 26a.

7. On the U.S. Trustee's appeal, a divided panel of the Fourth Circuit affirmed the district court's holding that Section 330(a)(1) forbids compensating debtors' attorneys from estate property, but it reversed the holding that the particular retainer paid by Equipment Services in this case was petitioner's property and thus immune from review under Section 330(a). The court of appeals therefore disallowed payment of the $1,000 petitioner earned during the Chapter 7 proceedings. The court acknowledged that its decision conflicted with rulings of the Second, Third, and Ninth Circuits. Pet. App. 2a, 6a-7a.

a. The Fourth Circuit majority held that "the plain language of the 1994 version of § 330(a)" is "unambiguous and is reasonable in application." Pet. App. 8a-9a. The court did not rest its decision on any literal prohibition against paying the debtor's attorney. Rather, it inferred that Congress so intended in recodifying the statute: "The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a Chapter 7 estate." *Id.* Deeming the deletion "plain," the court refused to consider contrary indications of congressional intent: "When a statute is unambiguous, canons of construction prevent us from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do." *Id.* 9a.

The Fourth Circuit separately reversed the lower courts' determination that the retainer received by petitioner was not part of the bankruptcy estate. The court of appeals agreed with petitioner and the U.S. Trustee that retainer agreements can be shaped to become property of the attorney, rather than property of the estate, and thus to avoid the provisions of Section 330(a):

> Retainer agreements can take various forms. For example, a retainer can be paid simply to ensure an

> attorney's availability to represent the client, whether or not services are ever performed. Or a retainer can be a prepayment for all future services to be performed, amounting to a flat fee. Under either one of these arrangements, the attorney acquires title to the retainer fee at the time he receives it, regardless of whether he thereafter performs legal services for the client. On the other hand, if the relationship is a trust arrangement in which the attorney holds the retainer for the client as security for the payment of future fees, then the retainer so held, less any fees charged against it, constitutes the property of the client.

Pet. App. 11a (citing *Indian Motorcycle Assocs.* v. *Mass. Housing Finance*, 66 F.3d 1246, 1254 (CA1 1995)). But under the particular retainer agreement in this case, the Fourth Circuit concluded that, as a matter of Virginia law, "until [petitioner] earned fees, the account remained the property of Equipment Services so that in the end, if any of the $6,000 remained, [petitioner] would be required to return the balance to Equipment Services." *Id.* The retainer was accordingly "property of the estate" and could only be used to pay fees consistent with Section 330(a). *Id.*

b. In dissent, Judge Michael agreed with the panel majority that the retainer was part of the bankruptcy estate but disagreed with its interpretation of Section 330(a)(1). See Pet. App. 13a-14a. He would have adopted the conclusion of the Second, Third, and Ninth Circuits that when Congress revised and recodified "§ 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* 13a. Because the bankruptcy court had only considered the reasonableness of the retainer under Section 329(b), and thus had not applied the more stringent guidelines for awarding fees set out in Section 330(a)(3) and (4), Judge Michael would have "vacate[d] the award of attorney's fees to [petitioner] for his post-Chapter 7 services and * * * remand[ed] for the bankruptcy court to evaluate [petitioner's] fee application under the proper standard." *Id.* 14a.

8. This Court subsequently granted certiorari to decide the following question: "Does 11 U.S.C. § 330(a)(1) authorize a court to award fees to a debtor's attorney?" Pet. i. Petitioner did not challenge the court of appeals' state-law determination that the particular retainer in this case was property of the estate, rather than of petitioner. *Id.* 8 n.2. The U.S. Trustee did not cross-petition (see S. Ct. R. 12.5) from so much of the judgment below as authorized petitioner to be paid for his services at the Chapter 11 stage of the proceedings.

SUMMARY OF THE ARGUMENT

The Fourth Circuit reasoned that the "plain language" of the Bankruptcy Code prohibits compensating debtors' attorneys from the funds of the bankruptcy estate because Section 330(a), as revised and recodified in 1994, omits the reference to the debtor's attorney that previously appeared in the statute's payees list. The negative inference drawn by the court of appeals exclusively from that one omission is unsound. It fails to account for the fact that Section 330(a) contains an obvious scrivener's error that renders the statute ambiguous: the payees and providers lists are inextricably intertwined, yet one refers to the debtor's attorney while the other does not. Both cannot be enforced as written. Nor is the failure of the payees list to mention the debtor's attorney dispositive of the power to compensate counsel, for that power can be located in other provisions of the Code as well. For those reasons and others, this Court can properly construe Section 330(a) only by looking beyond the isolated text of the payees list to factors such as the text of the statute as a whole, the animating purposes of federal bankruptcy law, and past practice under the Code.

The text and structure of Section 330(a), as well as other provisions of the Bankruptcy Code, demonstrate that the court

of appeals erred. Each party named in the providers list refers back to a parallel reference in the payees list. For example, "a trustee" may receive compensation for services by "the trustee." The better view is accordingly that, in retaining the authority in the providers list to pay compensation for the services of "the * * * attorney," Congress in 1994 necessarily assumed that an attorney would receive that compensation. Equally important, the court of appeals' decision cannot be reconciled with two other provisions that Congress added to Section 330(a) in the 1994 Act: subsection (a)(4) sets forth standards for paying the debtor's counsel; and subsection (a)(5) incorporates the power to pay the debtor's counsel interim compensation.

The legislative record furthermore demonstrates that the omission upon which the court of appeals seized was inadvertent, not a purposeful deletion from Section 330(a). The statute was the result of a last-minute amendment to the 1994 Act that, among other things, removed the phrases that appeared both immediately before and immediately after "or the debtor's attorney" in the payees list. Every indication – including from the Act's legislative history and the statement of the amendment's sponsor – is that the drafter made the mistake of striking all the text from the beginning of the first phrase to the end of the second. The inadvertent nature of the omission is confirmed by the fact that the amendment deleted even the conjunction "or," leaving the payees list grammatically incorrect.

The absence of any indication in the legislative record that Congress intended to eliminate the power to compensate debtors' counsel takes on still greater significance in light of the profound conflict that result would have with fundamental policies embodied by the Bankruptcy Code. Congress recognized in enacting Section 330(a) that counsel will not serve if they cannot be paid, a result that the bankruptcy system cannot countenance. Debtors have numerous important responsibilities that often can be fulfilled only with the assistance of an attorney. Even if the power to pay

counsel were eliminated only in the more than one million cases a year in which a trustee has been appointed to administer the assets of the estate – a result the text cannot sustain – the negative consequences for bankruptcy administration would be so profound that it is almost inconceivable that Congress could have intended to incur them.

Finally, this case is controlled by the canon of construction that legislation will not be construed to depart dramatically from longstanding bankruptcy practice absent some affirmative indication of congressional intent. The history of the payment of the fees of debtor's counsel in bankruptcy is one written in three parts: practice under the Bankruptcy Act of 1867; procedures under the Act of 1898; and procedures under the current Bankruptcy Code. The history is also one of three relevant themes: the gradual expansion of the role of debtor's counsel in bankruptcy proceedings; the recognition of the fairness and need for counsel to be paid from the estate in order to ensure the orderly administration of the estate and that essential services are performed; and the eventual abandonment of the concept that services performed in a bankruptcy case are less deserving of payment than other legal services offered in the marketplace generally. In reviewing this history, one observation is particularly striking. In exercising its rulemaking authority under the Act of 1867, this Court adopted a "General Order" abrogating the prior practice of allowing the fees of debtor's counsel to be paid out of the debtor's estate. Subsequently, in enacting the Act of 1898 (and, later, the provisions of the current Bankruptcy Code), Congress explicitly, consistently, and repeatedly repudiated the Court's prohibition. Given this express and sustained determination by Congress, the conclusion that it in 1994 implicitly removed authorization for the payment of the fees of debtor's counsel from Section 330 is tantamount to ascribing to Congress a view that it had never previously

embraced and, indeed, purposefully rejected at the close of the nineteenth century.

The judgment should accordingly be reversed.

ARGUMENT

I. Section 330(a) Contains a Scrivener's Error that Requires the Court To Consider the Text, Purpose, and History of the Statute and the Code as a Whole To Determine Its Meaning.

The Fourth Circuit held that the Bankruptcy Code does not permit the bankruptcy court to compensate petitioner for the services he provided in the Chapter 7 proceedings in this case, notwithstanding that those services benefited the bankruptcy estate. The panel majority refused to consider anything beyond the isolated text of Section 330(a)'s payees list – such as the text of the Code as a whole, the legislative history, the policies embodied by federal bankruptcy law, and prior practice. It maintained that the "plain language" of Section 330(a) compelled its construction. Pet. App. 8a. But that characterization by the majority of the statute considerably overstates the ruling's textual support. No provision of the Bankruptcy Code provides, as the court of appeals held, that the bankruptcy court is prohibited from compensating a debtor's attorney from the debtor's estate. The court of appeals instead rested its decision on the fact that "[t]he 1994 version clearly omits the prior authorization to compensate the debtor's attorney." *Id.* The decision below thus relies not on a statutory *proscription* against compensating counsel but on a negative *inference* that the absence of the phrase "a debtor's attorney" from the payees list of the 1994 Act is purposeful and controlling over other provisions of the Bankruptcy Code.

This Court should conclude that, for at least four reasons, the inference drawn by the court of appeals cannot alone bear the weight of its dramatic holding that Congress in 1994 eliminated the bankruptcy court's power to award fees to the

debtor's attorney from the property of the estate. Instead, the proper construction of Section 330(a) requires the Court to consider other sources that inform the statute's meaning.

First, the Fourth Circuit's contention that the text of Section 330(a) is "plain" is wrong. The statute is facially ambiguous, not clear, and contains an obvious scrivener's error. It sets forth two lists that are ineluctably tied together:

> The court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--(A) reasonable compensation for actual, necessary services rendered by *the* trustee, examiner, professional person, or *attorney* * * *.

11 U.S.C. 330(a)(1) (emphases added). The two lists are facially irreconcilable. Either Congress inadvertently omitted the "debtor's attorney" from the "payees" list, on which the court of appeals relied, or it inadvertently retained the reference to the attorney in the latter, "payees" list.[2] The 1994 Act also omitted the necessary conjunction "or" from the payees list, further evidencing the carelessness of the scrivener. There is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision.

Although petitioner believes that the drafting error was the omission of "or the debtor's attorney" from the payees list rather than the retention of the reference to the attorney in the providers list (see Part II-A, *infra*), the inescapable point for present purposes is that the statute contains a mistake of some kind. The court of appeals thus erred in drawing an inference exclusively from the text of the payees list in disregard of the

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[2] The lower courts themselves essentially acknowledged that the two lists are inconsistent. See Pet. App. 9a (court of appeals' recognition that, on its reading, "the reference in [the providers list] to 'attorney' may be superfluous"); *id.* 35a (bankruptcy court's acknowledgment that payees list is "arguably internally inconsistent with" providers list).

"cardinal rule that a statute is to be read as a whole" (*Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003)) and without regard to other indicia of congressional intent. Construction of the Bankruptcy Code, in particular, is a uniquely "holistic endeavor." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Second, the Fourth Circuit reasoned from the false premise that Congress in 1994 amended Section 330(a) by specifically deleting the reference to the debtor's counsel from the payees list. See Pet. App. 8a-9a. In reality, Congress substituted a new, and substantially different, version of Section 330(a). See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4106, 4130 (substituting new provision in place of former Section 330(a) that substantially revised subsection (a)(1) and added entirely new subsections (a)(2)-(6)). And as more fully described in Part III, *infra*, the phrase "debtor's attorney" was itself omitted from the substitute bill only in a last-minute overhaul of the whole provision. The change was thus in no sense the targeted and purposeful deletion from the predecessor Bankruptcy Code imagined by the court of appeals.

Third, the Bankruptcy Code contains authority to compensate counsel other than in the payees list of Section 330(a). The providers list on its face authorizes the fee award in this case, directing the bankruptcy court to award "reasonable compensation for actual, necessary services rendered by *the* * * * *attorney*." 11 U.S.C. 330(a)(1)(A) (emphasis added). Section 330(a) must be read to "give meaning to each element" of the statute (*Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001)), and thus to each element of the providers list. Section 503 similarly provides for the payment of administrative expenses to the extent they represent "the actual, necessary costs and expenses of preserving the estate." Our point is not that Section 503 permits compensation in circumstances *clearly precluded* by Section 330; it logically does not. Rather, because the literal

terms of the Code authorize the bankruptcy court to award fees in these circumstances, the negative inference drawn from the single statutory omission cited by the Fourth Circuit is not strong enough to justify its sweeping holding.

Fourth, it is simply implausible to believe that, if Congress actually did intend to make the radical departure from past practice of eliminating the power to compensate debtors' counsel, it would have done so in the oblique and ham-fisted manner of the 1994 revision to the statute. As just described, the 1994 Act eliminated only one of the two references to the attorney in Section 330(a). In addition, as we show in the next section, every other relevant source of statutory construction contradicts, and ultimately defeats, the inference drawn by the Fourth Circuit. Petitioner's position is thus supported by the text of the Code, the history of the 1994 Act, past practice, and the purposes of federal bankruptcy law. The leading treatise on bankruptcy law thus urges courts to recognize that the omission from the payees list is simply a drafting error:

> [S]ection 330(a)(1) of the Code deletes the reference to "the debtor's attorney" as a party who may be allowed compensation. Clearly this result was unintended * * *. [It] would represent a fundamental change in the law. * * * Because the change is inconsistent with current case law and the legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.

3 Collier ¶ 330.LH[5].

This Court has not hesitated to reject an inference, like that drawn by the court of appeals in this case, which is supported by an omission from a statute but is contradicted by other evidence in the text as well as the history of the provision's enactment and common sense. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence

of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136 (1991). Such a negative inference is "a valuable servant, but a dangerous master" and has no place where, as in this case, it "leads to inconsistency or injustice." *Ford* v. *United States*, 273 U.S. 593, 612 (1927) (citation omitted); see also *Chevron U.S.A.* v. *Echazabal*, 536 U.S. 73, 84 (2002) ("*Expressio unius* just fails to work" in such situations.).

II. The Decision Below Conflicts with the Text and Structure of Section 330(a) and Other Provisions of the Bankruptcy Code.

A. The better reading of the text of Section 330(a) is that Congress did not intend to eliminate the authority to compensate debtors' attorneys.

1. Interpreting Section 330(a) involves a forced choice between giving full effect to the payees list (which does not refer to the debtor's attorney) or instead to the providers list (which does). The text does not conclusively resolve the inconsistency, but what guidance it does provide undermines the Fourth Circuit's decision. The payees and providers lists function in parallel: "a trustee" may receive compensation for services by "the trustee"; "an examiner" for services by "the * * * examiner"; and "a professional person employed under section 327" for services by "the * * * professional person." 11 U.S.C. 330(a)(1). Read consistently, by retaining the reference in the providers list to "*the* * * * attorney," Congress assumed that an "attorney" would receive payment for the attorney's services. Cf. *United States* v. *Morton*, 467 U.S. 822, 828 (1984) (a statutory term "must be read in light of the immediately following phrase").

In addition, the providers list is grammatically correct; the payees list, which omits not just "a debtor's attorney" but also the introductory conjunction "*or*," is not. We are not suggesting that statutes deserve respect only in proportion to how well they are written. Rather, as between two closely related but flatly irreconcilable provisions contained in direct

succession, Congress more likely made an inadvertent mistake in the provision that contains the grammatical error.

2. The alternative reading of Section 330(a) pressed by the U.S. Trustee faces the equally substantial obstacle that it is logically inconsistent. The decision below reasons that Congress purposefully omitted the phrase "debtor's attorney" from Section 330(a), retaining only the authority to compensate distinct actors in the bankruptcy process: "a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103." The Fourth Circuit's premise was thus that Congress drafted the 1994 Act intending to *distinguish* the "debtor's attorney" from, *inter alios*, "a professional person employed under section 327."

But the U.S. Trustee elsewhere *rejects* that very premise, arguing that the debtor's attorney in some instances should be deemed "a professional person employed under section 327." In an effort to minimize the negative consequences of its construction of Section 330(a), respondent maintains that bankruptcy courts retain the authority to compensate debtors' counsel in Chapter 11 cases in which no trustee has been appointed.[3] Section 330(a) by its terms applies to attorney's fees in all forms of bankruptcy, including in cases under both Chapter 7 and Chapter 11, and furthermore without regard to whether a trustee has been appointed to administer the assets of the estate. The U.S. Trustee nonetheless asserts – without any support in the legislative record – that Congress in 1994 intended to eliminate the authority to pay the debtor's attorney *only* in Chapter 7 proceedings and those Chapter 11 proceedings in which no trustee has been appointed. It reasons that, in Chapter 11 cases in which there is no trustee,

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[3] As noted *supra* at 13, the U.S. Trustee has not challenged in this Court that portion of the judgment in this case that authorizes petitioner to be paid from the bankruptcy estate for the services he provided during the Chapter 11 proceedings. Our point is that the U.S. Trustee's concession that petitioner is entitled to those fees rests on an internally contradictory reading of Section 330(a).

the debtor in possession has a trustee's power to retain an attorney (11 U.S.C. 327(a), 1107(a)), who may in turn be compensated under Section 330(a) not as an "attorney" but as a "professional person employed under section 327."

The U.S. Trustee cannot have it both ways. If Congress in 1994 intentionally eliminated the authority to compensate "a debtor's attorney" but not "a professional person employed under section 327" from Section 330(a), without making any special provision for certain Chapter 11 proceedings, then that deletion must be given full effect. Yet neither *any court* nor the U.S. Trustee endorses the view that Congress intended to eliminate entirely the power to compensate counsel in all cases. But that is the inevitable consequence of the Fourth Circuit's reading of the statute.

The "debtor's attorney" furthermore cannot be equated with a "professional person employed under section 327" because the Code consistently distinguishes those two terms. See 11 U.S.C. 330(a) (providers list), 331 (interim compensation authority). Statutes will not be read so as to render their terms "altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

B. The Fourth Circuit's holding that Congress intended in the 1994 Act to prohibit bankruptcy courts from compensating counsel with funds of the debtor's estate cannot be reconciled with two provisions that Congress added to Section 330(a) at that time.

The most significant change made by Congress in revising and recodifying Section 330(a) in 1994 was its addition of detailed criteria under which the bankruptcy court is to determine whether, and to what extent, fees should be paid. The 1994 Act specifically added two new subsections relating to attorney compensation. The fact that the enactment on which the Fourth Circuit rested its decision *expressly contemplates* paying debtors' attorneys refutes its conclusion that Congress simultaneously intended to *eliminate* that very authority.

1. Section 330(a)(4), added in 1994, contains a categorical prohibition on awarding fees in certain circumstances, but provides an exception for attorneys in a subset of bankruptcies:

> (A) *Except as provided in subparagraph (B)*, the court shall not allow compensation for--
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were not--
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.
>
> (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation *to the debtor's attorney* for representing the interests *of the debtor* in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. 330(a)(4) (emphases added).

The 1994 Act, in Section 330(a)(4), thus explicitly contemplates that bankruptcy courts will award compensation to a "debtor's attorney" under subsection (a)(1). Congress adopted general standards governing the award of compensation (subsection (a)(4)(A)) that incorporate a specific exception that more permissively allows the award of fees to the debtor's attorney in a subset of cases otherwise subject to the general rule (subsection (a)(4)(B)). Neither the general rule nor the exception makes sense if, as the Fourth Circuit held, Congress intended in 1994 to render debtors' attorneys ineligible to receive compensation in the first instance. Put another way, the U.S. Trustee cannot offer a reading of the statute under which the special standards for compensating counsel in Chapter 12 and Chapter 13 cases actually operate, as the text requires, as an exception to the general standards of subsection (a)(4)(A).

The status of subsection (a)(4)(B) as an exception – as opposed to an affirmative grant of authority to compensate counsel only under Chapters 12 and 13 – is confirmed by the fact that it refers only to compensating the debtor's counsel for "representing the interests of *the debtor*" (emphasis added) but directs the bankruptcy court in awarding compensation to consider "the other factors set forth in this section," which include the "benefit [to] *the debtor's estate*" (emphasis added). The authority to pay compensation to the debtor's attorney for representing the interests of *the debtor's estate* must therefore arise from some other Code provision. Indeed, in virtually every context – including all instances under Chapter 7 and Chapter 11, and with respect to the payment of parties other than the debtor's counsel (such as the trustee) even under Chapters 12 and 13 – the *sine qua non* of compensation is benefit to the estate. See 11 U.S.C. 330(a)(3). It is difficult to imagine that Congress intended to compensate counsel in Chapter 12 and Chapter 13 cases for services that benefit the debtor but to forbid their compensation for the services they provide that benefit the estate.

2. Subsection 330(a)(5), also added by the 1994 Act, furthermore incorporates the authority to compensate debtors' counsel on an interim basis that is set forth in Section 331. It directs bankruptcy courts to "reduce the amount of compensation awarded under [Section 330(a)(1)] by the amount of any interim compensation awarded under section 331." 11 U.S.C. 330(a)(5). Section 331, in turn, employs the traditional list and provides that compensation may be paid to "[a] trustee, an examiner, *a debtor's attorney*, or any professional person employed under section 327." 11 U.S.C. 331 (emphasis added). Subsection (a)(5) thus contemplates the availability of interim compensation for all the parties named in Section 331; no exception was made for that paid to debtors' attorneys. Congress in 1994 could not have intended, as the Fourth Circuit concluded, to forbid that very compensation.

Relatedly, the Fourth Circuit's decision impermissibly reads out of the Code the explicit authority conferred by Section 331 to award debtors' attorneys interim compensation. "Obviously, if a debtor's attorney is eligible to apply for interim payments, she must be eligible for payments in the first place." *In re Taylor*, 250 B.R. 869, 871 (E.D. Va. 2000).

III. The Circumstances Surrounding the 1994 Recodification of Section 330(a) Refute the Claim that Congress Intended To Eliminate the Authority To Compensate Counsel.

The preceding analysis doubtless raises the question of the source of the scrivener's error that omitted the debtor's attorney from the payees list but retained it in all related sections. "No principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion." Pet. App. 22a. The answer lies in examining what actually changed in the 1994 amendments and how specific sentences were moved at the last minute. Both the providers and payees lists of Section 330(a)(1) as currently enacted are derived from similar provisions of the prior Code. Although the 1994 Act included a variety of wording differences beyond the omission of "a debtor's attorney," none was substantive.[4] Nothing suggests

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[4] The differences between the provisions, with deletions struck out and additions italicized, are as follows:

> (a)*(1)* After notice to ~~any~~ *the* parties in interest and ~~to~~ the United States Trustee and a hearing, and subject to sections 326, 328, and 329 ~~of this title~~, the court may award to a trustee, ~~to~~ an examiner, [*sic*] ~~to~~ a professional person employed under section 327 or 1103 ~~of this title, or to the debtor's attorney~~--
>
> > ~~(1)~~*(A)* reasonable compensation for actual, necessary services rendered by ~~such~~ *the* trustee, examiner, professional person, or attorney, ~~as the case may be,~~

that Congress in 1994 intended to do anything other than carry forward with minor wording changes the predecessor provisions governing the persons to whom compensation may be paid. To the contrary, as noted, the redrafted version of Section 330(a)(1) retains the debtor's attorney in the providers list.

The reference in the payees list to the debtor's attorney appears simply to have been inadvertently omitted when Section 330(a) was overhauled through a "last minute addition * * * to the 1994 Act." 3 Collier ¶ 330.LH[5], at 330-75. As originally introduced, the bill that became the 1994 Act would have revised Section 330(a), by making each of the non-substantive wording changes to subsection (a)(1) just noted, one of which is relevant here: the bill would have deleted the phrase "of this title" that appeared immediately *before* "or to the debtor's attorney" in the payees list. The bill also would have inserted, immediately *after* the reference to the debtor's attorney, an additional provision directing the U.S. Trustee to review fee applications. It provided:

> (a)(1) After notice to the parties in interest and the United States trustee and a hearing, * * * the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, *or the debtor[']s attorney*, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any

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> and by any paraprofessional persons employed by ~~such trustee, professional person, or attorney, as the case may be~~ *any such person* * * *.

> paraprofessional person employed by any such person * * *[.]

S. 540, 103d Cong. (1993), *reprinted in* S. Rep. No. 168, 103d Cong., 1st Sess. (1993) (emphasis added).

On April 21, 1994, the day the Senate passed the Act, it considered fifteen separate amendments prior to final passage. "The Bankruptcy Reform Act of 1994 comprehensively covers a wide range of bankruptcy provisions. Due to the breadth of the amendments, technical errors are to be expected." 3 Collier ¶ 330.LH[5], at 330-76.[5] The amendment at issue here, No. 1645, substantially reorganized the provisions of the proposed replacement version of Section 330(a). With respect to subsection (a)(1), it carried forward the proposed deletion of the phrase "of this title" that appeared before "or the debtor's attorney." The amendment also deleted and moved to a new subsection (a)(2), the newly proposed provision relating to the U.S. Trustee's authority to review fee applications that had appeared immediately after the reference to the debtor's attorney. 140 Cong. Rec. S4741-01 (daily ed. Apr. 21, 1994). But the amendment also omitted the phrase "or the debtor[']s attorney" that appeared between

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[5] Indeed, the 1994 amendments introduced an array of errors into the Code: Sections 330(a)(3)(A) and 546(g) appear twice; the Code skips from Section 101(2) to Section 101(4), with the former Section 101(3) moved to Section 101(21B); Section 101(56A) was inserted between Sections 101(53C) and 101(53D); Sections 365(c)(4) and (d)(5) through (d)(9) were not deleted as expired, yet subsection (p) was; Section 522(f)(2) was redesignated as Section 522(f)(1)(B), but the cross-reference in Section 522(g)(2) was left unchanged; new Section 523(a)(15) was placed at the end of Section 523 rather than at the end of Section 523(a); Section 362(b)(14) was renumbered as 362(b)(17), but the cross-reference in Section 553(b)(1) was not corrected; Section 553(b)(1) refers to Section 546(h), which does not exist because there are two Section 546(g)'s; and Section 726(b) refers to a nonexistent Section 1009.

the two purposeful deletions; the drafter struck from the beginning of one to the end of the other, apparently without recognizing the phrase in between. In other words, the omission seems to have been, quite literally, a "slip of the pen."

The legislative history furthermore contradicts the suggestion that Amendment No. 1645 purposefully deleted the authority to pay fees to debtors' counsel. The 1994 version of Section 330(a) sought "to codify many of the factors previously considered by courts in awarding compensation and reimbursing expenses." 3 Collier ¶ 330.LH[5], at 330-73. "The purpose of these amendments was to foster greater uniformity in the application, processing and approval of fees. To accomplish this goal, the amendments expand[ed] the factors that courts should consider in approving fee applications, recognize[d] a bankruptcy court's authority to review fee applications sua sponte and require[d] the executive office of the United States trustee to establish national guidelines for the allowance of fees and expenses." Norton Bankruptcy Law and Practice § 26:5, at 206 (2d ed. 1997 Supp.). "Coincidentally, the language providing for objections, which [the] amendment removed from § 330(a)(1) in the reorganization, was contained in a clause that happened to fall immediately after the term 'debtor's attorney,' although the two subject matters were *entirely unrelated*." *In re Century Cleaning Servs.*, 195 F.3d 1053, 1059 (CA9 1999) (emphasis added).

Indeed, directly contrary to the Fourth Circuit's decision, the legislative history contemplates that fees *will be paid* to debtors' attorneys. The definitive report on the 1994 Act states that Section 330(a), as revised,

> requires the United States Trustee to invoke procedural guidelines regarding fees in bankruptcy cases and file comments with fee applications. These changes should help foster greater uniformity

> in the application for and processing and approval of fee applications.

H.R. Rep. No. 835, 103d Cong., 2d Sess. 51 (1994); 140 Cong. Rec. H10,769 (daily ed. Oct. 4, 1994). The sponsor of the amendment in question, Senator Metzenbaum, similarly explained that it

> sets forth in clear and concise terms those factors that must be considered when deciding the appropriateness of a fee request. * * * In addition, the U.S. trustees will be required to adopt uniform procedural guidelines for the review of fee applications and where appropriate, object to a fee request.

140 Cong. Rec. S14,597-02 (daily ed. Oct. 7, 1994).

There is no substantial support in the legislative record for the contrary holding of the court of appeals. As noted, nothing in the legislative history suggests the deletion of the phrase "a debtor's attorney" was purposeful. One piece of written testimony provided to a Subcommittee of the House Judiciary Committee during consideration of the 1994 Act noted, in passing, "the apparently inadvertent removal of debtors' attorneys from the list of professionals whose compensation awards are covered by section 330(a)." *Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. & Commercial Law of the Comm. on the Judiciary*, 103d Cong. 551 (1994). In the unlikely event members of Congress were aware of this snippet, they likely agreed with its conclusion that the omission was inadvertent and would not alter the statute's meaning.

Subsequent to the Act's adoption, two "technical corrections" bills were introduced in the House that included, among their provisions, an amendment reinserting the debtor's attorney to the payees list. H.R. 120, 105th Cong. § 7 (1997); H.R. 764, 105th Cong. § 4 (1997). "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste*

Agency v. United States Army Corps of Engineers, 531 U.S. 159, 169-70 (2001). That rule is particularly apt here. Given the circuit conflict, the failure to pass corrective legislation does not indicate support for one reading of Section 330(a) over the other. The technical corrections bills may not have passed for a host of reasons, including objections to any of the several other amendments to the Bankruptcy Code they proposed.

The circumstances surrounding the omission of the phrase "a debtor's attorney," as confirmed by the legislative history, thus support the conclusion that Congress did not intend the radical change of prohibiting bankruptcy courts from compensating debtors' counsel but rather made an inadvertent error in the course of a last-minute statutory reorganization.

IV. The Fourth Circuit's Decision Conflicts with Basic Bankruptcy Policies and Produces an Absurd Result.

The inference drawn by the Fourth Circuit that Congress intended to eliminate the power to compensate counsel out of the assets of the bankruptcy estate is implausible for the further reason that it would entail an inexplicable, wholesale departure from not only the purpose of Section 330(a) as revised in 1994 but also the guiding principle of the "prompt and effectual administration" of federal bankruptcy law as a whole (*Katchen* v. *Landy*, 382 U.S. 323, 328 (1966)). The Code embodies Congress's recognition that the sound administration of the bankruptcy process requires imposing on debtors a variety of requirements, many of which can be fulfilled only by counsel. The 1994 Act does not eliminate any of these obligations of debtors. See, *e.g.*, 11 U.S.C. 341, 343, 521; Bankr. R. 1007(a), 2004, 4002.

This case is a perfect illustration. The owners of Equipment Services, a small mine services company, had no capacity to prepare either the Chapter 11 filing or the adversary complaint that petitioner filed on behalf of the debtor. Nor would the debtor have been aware of either the

significance of the conversion of the case to a Chapter 7 proceeding or its obligation to cooperate with the appointed trustee. Upon conversion, only counsel would have had the knowledge and experience either to arrange the "Section 341" creditors meeting or to coordinate the proceedings on the adversary complaint.

Commentators agree that the policies embodied by the Code require compensating debtors' attorneys in order to ensure the operation of the bankruptcy process:

> There are several postpetition services commonly performed by the debtor's attorney in chapter 7 proceedings that are necessary to the administration of the estate. If debtors' attorneys' compensation is not permitted, this may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those errors, thereby further extending the time necessary to adjudicate all parts of the case.

Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201, 219-20 (2001). We have collected other representative cases illustrating the valuable services provided by debtors' counsel, including in Chapter 7 proceedings and Chapter 11 proceedings in which a trustee has been appointed, in the Appendix, *infra*, at 29a-32a.

Counsel generally will not, of course, agree to serve a client in bankruptcy without compensation. Congress's point in enacting and subsequently revising Section 330(a) – a purpose which the Fourth Circuit's decision serves to defeat – was to ensure that attorneys are willing and able to represent parties to the bankruptcy process. "[I]t has become clear over the years that it is most difficult to attract competent attorneys to perform the often complex legal services required in bankruptcy if they must constantly be preoccupied with the manner in which they are to be paid * * *." W. Homer

Drake, Jr., Bankruptcy Practice for the General Practitioner § 10.14 (3d ed. 2002). The decision below thus runs contrary to the "principal goal" of ensuring "open access" to bankruptcy relief. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977); see also, *e.g.*, *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (CA7 1993) (Section 330 is designed to ensure "that attorneys [would] be reasonably compensated and that future attorneys [would] not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation. * * * [T]he important thing is to provide compensation in bankruptcy equivalent to that outside it."); *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) ("Bankruptcy judges may award compensation to a debtor's attorney pursuant to 11 U.S.C. § 330. This statute was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the bankruptcy field." (citing H.R. Rep. No. 595, *supra*, at 329-30)).

It is no answer that, as respondent suggests, the trustee can secure the assistance of counsel, including the counsel who previously represented the debtor (see 11 U.S.C. 327, 328(b)), who can be compensated as the trustee's lawyer under Section 330(a). That prospect is sufficiently uncertain – including because the choice would be left to the trustee and because the debtor's counsel may be deemed to have a preclusive conflict of interest (see 11 U.S.C. 327(a)) – that counsel will refuse to come into the case in the first instance. The Code also imposes distinct duties on *the debtor*, which needs its own counsel throughout the proceedings. But even if that were not so, respondent's proposal would be self-defeating at best, as it would provide no substantive benefit to the bankruptcy process but instead would give rise to an inefficient and ultimately purposeless process in which the parties regularly file form motions to name the debtor's lawyer as the counsel to the trustee.

The Fourth Circuit's view of Congress's intent is furthermore implausible even if, as the U.S. Trustee proposes, Section 330(a) is read to eliminate the power to compensate counsel not in every bankruptcy proceeding but instead in Chapter 7 cases and Chapter 11 cases in which a trustee has been appointed. If attorneys know that they cannot be compensated for work done under Chapter 7, then they will be loath to take on a Chapter 11 case for fear that a trustee will be appointed or (as in this case) the proceeding will be converted to Chapter 7. The construction of Section 330(a)(1) adopted below creates in the attorney's mind the fear that he or she will be left "working for free," in part because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI J. LEXIS 79, at *7-*8 (June 1999). Fearing that the canons of ethics would prevent them from abandoning their client once a trustee entered the case, attorneys will stay away from the outset. Cf. Model Rules of Professional Conduct Rule 1.16(b) (permitting attorneys to withdraw from representing a client only "if withdrawal can be accomplished without material adverse effect on the interests of the client" or if other unusual circumstances exist).

But in any event, there are more than one million Chapter 7 filings every year, more than twice the number for all other forms of bankruptcy combined. *2001 Year-End Totals for Filings Reach New High*, The Bankruptcy Strategist, Apr. 2002, at 1. Even those judges who read the text of the payees list to eliminate only the right to compensation in that subset of cases recognize the grave consequences of the rule they grudgingly apply. The bankruptcy judge in this case thus wrote that, in his experience, the failure to pay counsel will give rise to "a *very powerful* disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide

anything beyond the most perfunctory required post-petition services." Pet. App. 42a (emphasis added). Judge Thomas of the Ninth Circuit similarly recognized that the policies underlying Section 330 point in "favor of allowing attorneys to receive reimbursement under § 330. There are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate." *Century Cleaning Servs.*, 195 F.3d at 1060 (dissenting opinion). "Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in *pro se* cases, and in cases which become *pro se* after the petition is filed, does not aid the administration of our bankruptcy system." *Id.* at 1064.[6]

There also is no reason to believe that Congress decided to forbid compensating counsel under Section 330(a) in order to preserve the assets of the estate. Congress addressed the question of asset preservation in subsections (a)(3) and (a)(4), which set forth detailed criteria for awarding fees, and which forbid compensation (except in cases under Chapters 12 and 13) for "unnecessary duplication of services" and services that are not "(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." "There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services 'reasonably likely to benefit

[6] There is also no reason Congress in 1994 would have chosen to eliminate the right to compensation from the assets of the estate in Chapter 7 cases and Chapter 11 "debtor out of possession" cases as the Fourth Circuit supposed, but simultaneously preserved (and even enhanced) the right to compensation in all other forms of bankruptcy. The distinction cannot be that the assets are being liquidated, for there is no liquidation under Chapter 11. Nor can the distinction be the presence of a trustee, for a trustee is appointed in Chapter 12 and 13 cases as well. See 11 U.S.C. 1202, 1302.

the debtor's estate.'" Pet. App. 24a (quoting 11 U.S.C. 330(a)(4)(A)(ii)(I)) (emphasis added). "The bankruptcy court may reduce or even disallow the requested amount of compensation when no real benefit is conferred upon the debtor's estate by the services for which the applicant seeks compensation." 3 Collier ¶ 330.03[3], at 330-25 (collecting cases). We have collected representative cases illustrating the scrutiny that bankruptcy courts apply to fee applications submitted by debtors' counsel, including in Chapter 7 proceedings and Chapter 11 proceedings in which a trustee has been appointed, in the Appendix, *infra*, at 33a-35a. The Fourth Circuit nonetheless attributed to Congress an illogical, penny-wise and pound-foolish determination to eliminate entirely – as a purportedly asset-preserving measure – compensation that is essential to debtors' receipt of legal services that are "necessary" and "benefi[cial]" to the value of the estate.

Indeed, the Fourth Circuit's decision is likely to have the absurd consequence in many cases of *reducing* the assets of the estate, as well as the bankruptcy court's control over fee awards. Congress could not have intended either result, given that the principal innovation of the 1994 Act was the adoption of more stringent standards for the court to apply in reviewing fee applications. The court of appeals held, and the U.S. Trustee agreed, that debtors and their counsel may enter into pre-petition "general" retainer agreements that, because they are the debtor's property rather than property of the estate, will be reviewed only for their "reasonableness" under Section 329(b) rather than under the more stringent standards of Section 330(a). See Pet. App. 11a. There can be no dispute regarding "the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case." *Id.* 43a. Indeed, the attorney will logically insist that the retainer be enhanced to account for the risk that services required in the proceeding

will be more extensive than anticipated, thereby reducing the funds that are ultimately available to creditors as a part of the estate.[7]

V. Congress Would Not Have So Profoundly Changed Prior Bankruptcy Practice Without Any Acknowledgement in the Statutory History.

The Fourth Circuit's decision implausibly attributes to Congress the intent to abandon silently over a century of established bankruptcy law authorizing the payment of the fees of debtor's counsel from the assets of the bankruptcy estate. "When Congress amends the bankruptcy laws, it does not write on 'on a clean slate.'" *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). As this Court has repeatedly made plain, "[w]e * * * 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)); see also *Davenport*, 495 U.S. at 565 (Blackmun, J., joined by O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. * * * * To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978." (citations omitted)). Applying this approach in a series of cases, the Court has indicated time and again that, in construing the provisions of the Code, it will not presume that Congress intended to overturn an established bankruptcy rule

[7] Although some jurisdictions prohibit such retainers (see, *e.g.*, *In re Craig*, 265 B.R. 624, 629 (Bankr. M.D. Fla. 2001) (discussing Florida law)), others do not, and it is unlikely that Congress intended to make the availability of compensation in federal bankruptcy proceedings turn on the nuances of individual states' attorney ethics rules.

sub silentio, but will instead require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

Since the adoption of the Constitution, Congress has enacted five distinct bankruptcy acts. The first, the Act of 1800, and the second, the Act of 1841, contained no express provision for the compensation of debtor's counsel out of the property of the debtor's bankruptcy estate. See Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); 3A Collier ¶ 64.01, at 2046-47 (14th ed. 1988).[8]

Enacted in the wake of the Civil War, the Nation's third bankruptcy statute – the Act of 1867 – was distinctly different. See Bankruptcy Act of 1867, ch. 176, 14 Stat. 517

[8] This is not surprising. Both statutes were enacted during a period in which imprisonment for debt was common and insolvent debtors were viewed, more often than not, as criminal offenders. See Charles Warren, Bankruptcy in United States History 52 (1935) (discussing the gradual abolishment of the practice of imprisonment for debt in the United States during the first half of the nineteenth century); James Kent et al., *Bankrupt and Insolvent Laws, Report of the Incalculable Chancellor and Judges of the Supreme Court of the State of New York* (Jan. 22, 1819), *reprinted in* 16 Niles' Wkly. Reg. 85 (1819) (extolling the virtues of the common practice of imprisonment for debt). Moreover, both bankruptcy acts were principally debt collection devices concerned with the seizure and liquidation of the debtor's property, and each contemplated little role for the debtor (or, by extension, his counsel) beyond the debtor's surrendering of his property and submission to interrogation. See Act of 1800, § 18, 2 Stat. at 26 (providing that imprisoned debtor would be subject to examination); *id.* § 20, 2 Stat. at 27 (authorizing officials administering the Act to "break open" the debtor's houses and chests and take possession of all of the debtor's property); Act of 1841, § 3, 5 Stat. at 442 (transferring the debtor's property to the bankruptcy assignee); *id.* § 4, 5 Stat. at 443-44 (providing that the debtor would be subject to examination "at all times," and would be guilty of perjury for any false statement).

(repealed 1878). First, it was crafted after the general demise of the practice of imprisonment for debt and likewise reflected emerging popular perceptions of insolvent debtors as typically "honest but unfortunate" rather than criminal. See *Edwards* v. *Kearzey*, 96 U.S. 595, 602 (1877) (remarking that "[i]mprisonment for debt is a relic of ancient barbarism" and that "[e]very right-minded man must rejoice when such a blot is removed from the statute-book"). Second, the Act expanded both the debtor's benefits in bankruptcy (primarily by providing an enhanced right of discharge) and likewise the debtor's role in the administration of the case. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 588 (1935) ("[t]he discharge of the debtor has come to be an object of no less concern than the distribution of his property"); *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918) (observing the importance of granting the "unfortunate" debtor a discharge); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 353-62 (1991) (discussing innovations under the Act of 1867, including expanded right of discharge).

Because the Act contemplated that the debtor would surrender all of his property at the commencement of the case to an "assignee" (essentially, a trustee), the Act logically and expressly contemplated that the debtor's expenses incurred in complying with the Act would likewise be borne by the estate, although it did not expressly address the compensation of the *debtor's* counsel. See Act of 1867, §§ 26, 28, 14 Stat. at 529-31. Exercising its rulemaking authority under the Act (see Act of 1867, § 10; see also *J.B. Orcutt Co.* v. *Green*, 204 U.S. 96, 103 (1907)), and reacting to amendments by Congress restricting the payment of most administrative expenses (Act of June 22, 1874, ch. 390, § 18, 18 Stat. 178, 184), this Court weighed in on the practice of paying the fees of debtor's counsel by abrogating it. The Court's General Order 30 provided that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, *except when necessarily employed by the assignee*,

when the same may be allowed as disbursements." See *In re Gies*, 10 F. Cas. 339, 339 (E.D. Mich. 1875) (emphasis added). Because the debtor's counsel was employed by the *debtor* rather than the assignee, General Order 30 was thought to prevent the payment of the fees of debtor's counsel. See *id.*; *In re Handell*, 11 F. Cas. 420 (W.D. Tex. 1876) (same).

Against this backdrop, Congress revisited the issue of the payment of the fees of debtor's counsel, and rejected the approach of General Order 30, when it enacted the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. In no fewer than three separate provisions of the 1898 Act, Congress expressly authorized the payment of the fees of the debtor's attorney.[9]

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[9] Congress so provided in Section 64(b)(3). After further amendment (including one that transferred the provisions of Section 64(b)(3) to Section 64(a)(1)), the section, as it existed immediately prior to the enactment of the Bankruptcy Code in 1978, expressly authorized the payment of "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases * * * in such amount as the court may allow." Bankruptcy Act of 1926, Pub. L. No. 69-301, § 15, 44 Stat. 662, 667.

In addition, in 1934 Congress enacted Section 77B dealing specially with corporate reorganizations. Act of June 7, 1934, ch. 424, 48 Stat. 911, *codified at* 11 U.S.C. 207. In creating this special procedure, Congress also specifically authorized the court in reorganization proceedings to "allow a reasonable compensation for the services rendered * * * in connection with this proceeding * * * by * * * parties in interests * * * and the attorneys * * * of any of the foregoing *and of the debtor*." Bankruptcy Act of 1898, ch. 54, § 77B(c)(9), 30 Stat. 544, *codified at* 11 U.S.C. 207(c)(9) (emphasis added). In 1938, Congress replaced Section 77B with the corporate reorganization provisions of Chapter X, and specifically replaced Section 77B(c)(9) with Section 241 of Chapter X. In relevant part, Section 241(4) provided that "[t]he judge may allow * * * reasonable compensation for services rendered * * * in

As this Court subsequently explained, the touchstone for the allowance of compensation of the fees of debtor's counsel under the 1898 Act was whether those fees were "rendered in aid of the administration of the estate and the carrying out of the provisions of the act." *Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472, 476 (1933); see also *Randolph & Randolph* v. *Scruggs*, 190 U.S. 533, 539 (1903); 3A Collier ¶ 62.31, at 1596-1600 (14th ed. 1988) (collecting cases). To the extent that they were rendered in aid of administration, fees were properly compensable and the reported decisions clearly establish the link between the payment of these fees and the useful and necessary functions of counsel for the debtor in the administration of the debtor's bankruptcy case. See *In re Kross*, 96 F. 816, 819 (S.D.N.Y. 1899); 3A Collier ¶ 62.31[3], at 1604-10 (14th ed. 1988); *id.* ¶ 62.31[4], at 1610-12 (analyzing fees compensable under Section 64); 6A Collier ¶ 13.04, at 571-76 (14th ed. 1988) (analyzing fees compensable under Section 241).

As summarized by one court, although the 1898 Act authorized compensating the debtor's counsel, it required strict frugality:

> The amount of compensation should be based, in ordinary cases, upon the nature of the case, the extent and character of the work actually performed, and the amount involved in the controversy. In bankruptcy cases, while these elements should properly be considered in fixing the compensation of the attorney, the policy of the act should be steadily

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a proceeding under this chapter * * * (4) by the attorney for the debtor." See also former Chapter X Rule 10-215(c)(1) (providing a similar authorization).

Finally, in addition to Sections 64 and 241, Congress also added the provisions of Chapter XII governing real property arrangements and, in doing so, added Section 491. Act of 1898, § 491, 11 U.S.C. 891. Section 491(4) is identical in all material respects to Section 241.

> kept in view, that is, that it should be administered with *severe economy* * * * so as to reduce to the lowest minimum the costs of administration.

In re Lang, 127 F. 755, 757 (W.D. Tex. 1904) (emphasis added); see also 3A Collier ¶ 62.05[1], at 1427 (14th ed. 1988).

When Congress enacted the 1978 Bankruptcy Code after ten years of study, it continued in Section 330(a) the practice of providing for the payment of the fees of debtor's counsel out of the assets of the estate. Significantly, in enacting Section 330, the debate in Congress focused not on the practice of compensating the debtors' counsel *vel non*, but rather on the standard by which professional fees would be allowed. That debate was resolved in favor of *enhancing* compensation. As described in the definitive joint statement of the floor managers of the 1978 Act:

> Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11 * * *. Notions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code.

124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6442; 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978

U.S.C.C.A.N. 6505, 6511. Section 330 thus reflected an intentional liberalization of the award of attorney's fees in bankruptcy cases in favor of attracting skilled representation. See 3 Collier on Bankruptcy ¶ 330.LH[4] (15th ed. rev. 2001).

In sum, other than a brief deviation by this Court under its rulemaking authority that was corrected by Congress in a subsequent legislative revision, there has *never* been a question for over a century that compensation for debtors' counsel comes from the estate. Legislative revision has focused on ways to watch-dog that compensation and perceived problems of quality of representation, but never on the long-established question of compensation *simpliciter*. In the 1994 Act, either Congress swept aside this century of long-settled practice without a hint of deliberation, or the scrivener erred in a statutory amendment that contains both a grammatical error and an internal inconsistency on its face. This Court's precedents holding that Congress will not be held to have dramatically departed from prior bankruptcy practice without discussion compel the latter conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

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RELEVANT STATUTORY PROVISIONS

11 U.S.C. 327(a) provides in relevant part:

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys * * * or other professional persons * * * to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. 328(a) provides in relevant part:

The trustee * * *, with the court's approval, may employ * * * a professional person under section 327 or 1103 of this title * * * on any reasonable terms or conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.

11 U.S.C. 329 provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel such agreement, or order the return of any such payment, to the extent excessive, to –

(1) the estate, if the property transferred –

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. 330(a) provides:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) [*sic*] the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

11 U.S.C. 331 provides:

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order of relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

11 U.S.C. 501(a) provides in relevant part:

A creditor * * * may file a proof of claim.

11 U.S.C. 502 provides in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest * * * objects.

(b) * * * [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim * * * and shall allow such claim in such amount, except to the extent that –

* * *

(4) if such claim is for services of an * * * attorney of the debtor, such claim exceeds the reasonable value of such services;

* * * .

11 U.S.C. 503 provides in relevant part:

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(a) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; * * *

(2) compensation and reimbursement awarded under section 330(a) of this title;

* * * .

11 U.S.C. 507(a) provides in relevant part:

The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title * * *.

11 U.S.C. 726(a) provides in relevant part:

Except as provided in section 510 of this title, property of the estate shall be distributed –

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title * * *.

11 U.S.C. 1107(a) provides:

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.

CHAPTER 7

NO.: 98-04851-WSA-7

NOTICE

TO ALL CREDITORS AND PARTIES OF INTEREST:

PLEASE TAKE NOTICE that on July 6, 2000 at 10:00 a.m. I will appear before the Judge of this court in the United States District Courtroom at Abingdon and move for approval of my Fee Application filed in this case requesting fees in the amount of $2,325.00 and costs in the amount of $3.85.

_____

John M. Lamie
Browning, Lamie & Sharp, P.C.
P.O. Box 519
Abingdon, VA 24210
Counsel for Equipment Services, Inc.

CERTIFICATE

I, John M. Lamie, do hereby certify that I have mailed a true and correct copy of the foregoing Notice to the debtor, all creditors and parties in interest listed on the bankruptcy matrix, Robert Wick, Trustee, PO Drawer 8, Bristol, Virginia 24203 and the United States Trustee, 280 Franklin Road, S.W., Roanoke, VA 24011, on this the 2 day of June, 2000.

_____

John M. Lamie

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.
CHAPTER 7

NO.: 98-04851-WSA-7

APPLICATION FOR FEES

Comes now John M. Lamie, counsel for the debtor in the above proceeding, and applies for fees as follows:

1. John M. Lamie has represented Equipment Services, Inc. in this bankruptcy case from December 24, 1998 until the date of this Fee Application. This case commenced as a Chapter 11 and converted to Chapter 7 on March 17, 1999.

2. During that time he has provided legal services to the debtor as follows: drafting bankruptcy petition and schedules, conferring with the debtor on financial matters, appearing at Court proceedings and representing the debtor in the bankruptcy proceedings.

3. He has expended through May 31, 2000 $0.00 in costs and provided 18.60 hours of legal services. An itemized statement of the costs and expenses is attached hereto.

4. Additional costs are $3.85 for mailing the Fee Application and Notice.

5. The hourly rate for John M. Lamie in his representation of the debtor was $125.00 per hour and the debtors have paid $6,000.00 as a retainer in this proceeding. (*From the retainer the filing fee of $830.00, an Aaversary Proceeding filing fee of $150.00 and an Amendment fee of $20.00 was paid*).

6. The fees expended in this proceeding were reasonable and necessary expenses for representing the debtor and were incurred in the best interest of the estate.

WHEREFORE, John M. Lamie prays that the Court approve his Fee Application in this proceeding for $2,325.00 and costs in the amount of $3.85.

Respectfully submitted,

_____

John M. Lamie
Counsel for the Debtor

EQUIPMENT SERVICES
Case No. 98-04851
Our File No. 98-0409A

DATE	SERVICES RENDERED	TIME SPENT
12/24/98	Cover letter to the Court w/Chapter 11 voluntary petition, List of 20 Largest Unsecured Creditors, etc.	1.0
12/31/98	Review U.S. Trustee package	0.2
12/31/98	Draft letter to client re: forms	0.2
12/31/98	Instruct assistant on preparation of schedules	0.1
1/4/99	Review Debtor-In-Possession Order	0.1
1/4/99	Letters to client re: US Trustee forms, telephone conferences w/US Trustee for 1/15/99 @ 11:00a.m., and Application for Order Approving Employment of Attorney	0.3
1/5/99	Call from Mr. Dowdy about High Hops collection effort of this debt.	0.2
1/11/99	Cover letter to the Court w/Motion for Extension of Time in Which to File Schedules	0.2
1/13/99	Review correspondence from the IRS	0.1
1/13/99	Letter to client re: reminder of hearing set for 1/29/99 @ 10 a.m.	0.1
1/15/99	Cover letter to the Court w/Application for Order Approving Employment of Attorney and Declaration	0.2
1/15/99	Letter to the US Trustee's office w/copy of Application for Order Approving Employment of Attorney and Declaration and proposed Order	0.2

1/15/99	Letter to F. Bradley Pyott, Esq. re: L.B.J. Coal Co., Inc. Complaint	0.2
1/20/99	Cover letter to the Court w/Amended Declaration	0.2
1/22/99	Letter to the US Trustee's Office re: mailed originals of the Debtor-in-Possession Report by the Debtor	0.2
1/26/99	Review final draft of schedules	0.3
1/27/99	Review correspondence from B. Copeland re: Motion to Compel	0.1
1/27/99	Letter to client re: Motion to Compel filed by B. Copeland	0.1
1/27/99	Cover letter to the Court w/remaining schedules	0.2
1/28/99	Review correspondence from B. Copeland re: request for copy of schedules and Motion for Relief on behalf of Carlis McGlothlin	0.1
1/29/99	Appear at 341 meeting	0.5
2/1/99	Review correspondence from B. Copeland re:Notice of Appearance and Request for All Notices, Plans and Disclosure Statements	0.1
2/1/99	Letter to H.P. Hess w/ Application for Order Approving Employment of CPA	0.2
2/3/99	Letter to client w/Corporate Resolution and Application to Approve the Employment of CPA	0.2
2/17/99	Review Notice of Hearing from B. Copeland for 3/16/99 @ 11:00 a.m. re: Hiope Mining, Inc. v. Equipment Services, Inc.	0.1
2/18/99	Call to clients re: Equipment move	0.3
2/18/99	Draft Complaint	0.5
2/19/99	Phone dep. of witness on AP	0.3

2/22/99	Call from Copeland re: equipment	0.2
2/22/99	Call to Dowdy	0.2
2/23/99	Proof AP draft	0.3
2/23/99	Cover letter to the Court w/AP, filing fee	0.2
2/24/99	Review correspondence from B. Copeland re: Emergency Motion to Appoint Trustee or to Designate Responsible Individual or to Appoint Examiner and/or Convert to Ch. 7 and Motion to Shorten Time	0.1
2/25/99	Review correspondence from B. Copeland re: Amended Motion for Relief	0.1
2/25/99	Review Service of Process of Summons and Complaint	0.1
2/26/99	Review motion from Hiope and call Mr. Dowdy about hearing.	0.3
3/1/99	Call Mr. Dowdy about hearing on Motion for a Trustee	0.3
3/3/99	Review fax correspondence from the US Trustee re: Motion for a Trustee/insurance	
3/6/99	Call Lee Dowdy about insurance on equipment	0.3
3/8/99	Review correspondences from B. Copeland re: Counter Claim and Answers	0.1
3/8/99	Letter by fax to the US Trustee re: letter of 3/3/99	0.2
3/10/99	Call client and U.S. Trustee re: insurance on equipment	0.1
3/13/99	Telephone conference re: litigation over mine site	0.5
3/16/99	Appear at hearing on the AP & motions of L.B.J., et al.	1.0
3/17/99	Letter to client re: 3/16/99 AP and hearing	0.2

3/22/99	Review Order Converting Case	0.1
3/23/99	Review file, notice of appeal, write client and Trustee	0.4
3/31/99	Cover letter to the Court w/ Final Report of the Debtor-In-Possession	0.2
3/31/99	Prepare Notice of Amendment for client to sign	0.2
4/6/99	Letter to the Court w/Notice of Amendment to Equipment Services, Inc. bankruptcy	0.1
4/13/99	Letter to client re: Ch. 7 341 meeting set for 4/21/99 @ 3 p.m.	0.1
4/19/99	Review Proof of Claim from Charlie Jessee on behalf of Lee and Loretta Dowdy	0.1
4/21/99	Appear at 341 meeting	0.5
4/27/99	Telephone conference with Chris Ruhe and Bob Copeland Re: equipment at the mine	0.2
5/24/00 [sic]	Review Proof of Claim from Charlie Jessee on behalf of American Bit Company	0.1
10/22/99	Letter to client re: status of AP and reminder of status hearing on 12/6/99 @ 9 a.m.	0.1
12/6/99	Review fax correspondence from B. Copeland re: Temporary Restraining Order	0.1
12/8/99	Review correspondence from B. Copeland re: Emergency Motion to Relieve Stay, If Applicable, to Secure Property of Movant	0.1
12/10/99	Review Temporary Restraining Order	0.1
12/10/99	Review correspondence from the Court re: filing fees	0.1
12/14/99	Hearing	0.5

12/15/99	Cover letter to Judge Stone w/Order on AP	0.2
12/20/99	Letter to client re: status of case	0.2
1/21/00	Letter to Bob Wick w/copy of complaint, Bob Copeland's Answers and order substituting as plaintiff	0.2
1/24/00	Review correspondence from Bob Wick re: Exchange of names of witnesses and photocopies of exhibits	0.1
2/16/00	Appear at Trial	0.5
3/8/00	Call to/from client re: allegations mine is flooded	0.2
3/8/00	Letter to Bob Wick re: allegations mine is flooded with equipment in it.	0.2
3/20/00	Review Notice of Filing Appeal	0.1
3/23/00	Letter to Bob Wick re: Notice 3/20/00	0.2
3/23/00	Letter to client re: Court's ruling and status of case	0.2
3/24/00	Review Amended Notice of Appeal to The US District Court	0.1
3/27/00	Review Designation of Issues on Appeal and Designation of Record on Appeal	0.1
5/17/00	Review Brief of the Appellant	0.1
5/25/00	Draft and review Fee Application	0.5
5/31/00	Prepare Fee Application, cover letter and Notice of Hearing	2.0
	Total Hours Expended	18.60

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

In re: **EQUIPMENT SERVICES, INC.** Debtor(s)	Case No. 98-04851-HPA-7 Chapter 7

ORDER CONVERTING CASE

It is hereby ORDERED that this case be, and the same hereby is, converted from a case under Chapter 11 to a case under Chapter 7 of Title 11 of the United States Code; and it is further

ORDERED

that the debtor(s) (or Trustee) in the superseded case shall file with the Court a final report and account within thirty (30) days from the date of the entry of this Order. Said report shall include a schedule of unpaid debts incurred after commencement of the superseded case. Said report shall also include the name, address and zip code in MATRIX form of all such additional creditors.

It is further ORDERED that if an Order confirming a plan was entered in the superseded case, the debtor(s) (or Trustee) shall file with the Court (A) a schedule of property not listed in the final report and account, which property was

acquired after the filing of original petition but before the entry of this Conversion Order; (B) a schedule of unpaid debts not listed in the final report and account, additionally in matrix form, incurred after confirmation but before entry of this Conversion Order; and (C) a schedule of executory contracts entered into or assumed after the filing of the original petition but before entry of this Conversion Order.

Service of a copy of this Order shall be by mail to the debtor(s), attorney for the debtor(s), Trustee, if any, U.S. Trustee, and all creditors and parties in interest.

DATED: March 17, 1999

H. Clyde Pearson, Judge
U.C./S.C

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

March 31, 1999

John W. L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-HPA-7

Dear Mr. Craig:

Please find enclosed, for filing, the Final Report of the Debtor-in-Possession in the above referenced case.

Thank you for your kind assistance.

Sincerely yours,

John M. Lamie

pma
Enclosure
xc: US Trustee (w/enc)

P.O. Box 850
Grundy, VA 24614
540-935-5240
Fax 540-935-7232

P.O. Box 459
Lebanon, VA 24266
540-889-1182
Fax 540-889-2215

P.O. Box 519
Abingdon, VA 24212
540-628-6165
Fax 540-628-4847

P.O.Box 827
Wytheville, VA 24382
540-228-2119
Fax 540-228-2032

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.	) CHAPTER 7
	) CASE NO.
Debtor.	) 98-04851

FINAL REPORT BY CHAPTER 11 DEBTOR-IN-POSSESSION

The debtor, Equipment Services, Inc., by counsel, files as its Final Report of the Debtor-in-Possession upon conversion of the case, the following:

1. Debtor incurred no additional unpaid debts after the commencement of the case.
2. Debtor acquired no new property after the commencement of the case.
3. Debtor entered into no new contracts after the commencement of this case.
4. Debtor has no funds to report in its Chapter 11 account.

Dated: March 31, 1999
EQUIPMENT
SERVICES, INC.

BY:_____
John M. Lamie

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

April 6, 1999

John W.L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
98-04851-HPA-7

Dear Mr. Craig:

Enclosed please find a notice of amendment for the above named debtor which I would appreciate your filing along with a check for $20.00 for the filing of same.

This is to certify that I have mailed a true copy of the notice of amendment, proof of claim, and original 341 notice, to all parties in interest.

Thank you for your kind assistance.

Sincerely yours,

John M. Lamie

pma
Enclosure

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

United States Bankruptcy Court
for the Western District of Virginia

IN RE: EQUIPMENT SERVICES, INC.) Chapter 7
) Case No. 98-
Debtor.) 04851-HPA-7

NOTICE OF AMENDMENT TO DEBTOR'S SCHEDULES OF CREDITORS AND/OR MATRIX

Debtor, pursuant to Bankruptcy Rule 1009, hereby gives NOTICE of the names of creditors added to debtor's schedules of creditors and/or mailing matrix as follows:

NAME AND ADDRESS OF CREDITOR	DATE OF DEBT AND SECURITY IF ANY	WHETHER DISPUTED	AMOUNT
Lee and Loretta Dowdy PO Box 1805 Richlands, VA 24641	unsecured business loan	UD	$100,000.00

Dated: 4/5/99

LORETTA DOWDY, PRESIDENT

The above-named debtor(s) certifies under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. Section 1746.

NOTICE IS FURTHER GIVEN that the above-named creditor(s) are hereby given 10 days from the date such notice of amendment to schedules are/or mailing matrix is mailed by debtor to file objections to the granting of the discharge or to determine the non-dischargeability of such debt pursuant to 11 U.S.C. Section 727 and Section 523 and Bankruptcy Rule 7001, et seq., and Bankruptcy Rules 2004(a) and 4007(d); and to file a proof of claim herein, if it be so advised, or until the last date fixed by the Notice of the Section 341(a) meeting of

creditors, whichever period is longer; and that if a discharge has heretofore been granted, the same shall be deemed set aside for the purposes herein stated and will be deemed reinstated without further notice or order at the expiration of 30 days from this date unless timely objections are filed.

CERTIFICATION

I hereby certify that I have contacted the Bankruptcy Court Clerk's office and the above-styled case has not been closed or I have enclosed herewith a Motion to Re-open and the appropriate filing fees. I further certify that a true copy of the Notice was duly mailed on 4-6-99, to the Court, debtor, trustee, U.S. Trustee, and, if the Section 341(a) creditors' meeting notice has been issued, to the above-named creditors, which notice of amendment to said creditors shall include a copy of the Section 341(a) creditors' meeting notice, proof of claim form, and order of discharge, as applicable.

Signed:_____
JOHN M. LAMIE

Form B9D (Chapter 7 Corporation/Partnership Asset Case)(9/97)

Case Number 98-04851-HPA-7

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT VIRGINIA	
Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines A bankruptcy case concerning the debtor corporation listed below was originally filed under chapter 11 on December 24, 1998 and was converted to a case under chapter 7 on March 16, 1999. You may be a creditor of the debtor. **This notice lists important deadlines**. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.	
See Reverse Side For Important Explanations	
Debtor (name(s) and address): EQUIPMENT SERVICES, INC. PO BOX 1805 RICHLANDS, VA 24641	
Case Number: 98-04851-HPA-7	Taxpayer ID Nos.: 54-18775533
Attorney for Debtor (name and address): JOHN M. LAMIE, ESQ BROWNING, LAMIE & SHARP, P.C. P.O. BOX 519 ABINGDON, VA 24212-0519 Telephone number: (540) 628-6165	Bankruptcy Trustee (name and address): ROBERT E. WICK, TR. P.O. DRAWER 8 BRISTOL, VA 24203 Telephone number: (540) 466-4488

Meeting of Creditors:	
Date: April 21, 1999 Time: 3:00 P.M. Location: U.S. Bankruptcy Court, U.S. Courthouse, Abingdon, VA 24210	
Deadline to File a Proof of Claim: Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline: For all creditors (except a governmental unit): July 20, 1999 For a governmental unit: July 20, 1999	
Creditors May Not Take Certain Actions: The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.	
Address of the Bankruptcy Clerk's Office: 210 CHURCH AVE. SW P.O. BOX 2390 ROANOKE, VA 24010 Telephone number: 540-857-2391	**For the Court:** Clerk of the Bankruptcy Court: John W. L. Craig, II
Hours Open: Monday-Friday, 8:00 a.m.-4:30 p.m.	Date: March 17, 1999

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

December 17, 1999

John W. L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
Chapter 11 Case No. 98-04851-HPA-11

Dear Mr. Craig:

Enclosed please find a certificate of mailing in the above mentioned case which certifies that a true copy of the Order entered on December 16, 1999 was mailed to all parties in interest.

Thank you for your kind assistance in this regard.

Sincerely yours,

John M. Lamie

JML:rg
Enclosure

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
John M. Heuser

Please respond to the Abingdon Office

John M. Heuser
John J. Gifford
Scott S. Farthing
Eric Reese, Paralegal

January 21, 2000

Robert E. Wick, Trustee
PO Drawer 8
Bristol, VA 24203

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-WSA-7
Equipment Services, Inc. V. LBJ Coal Company, Inc.
And Hiope Mining, Inc.
A/P No. 7-99-00035

Dear Bob:

Please find enclosed a copy of the complaint in the above referenced adversary proceeding. Also enclosed is a copy of Bob Copeland's answers and a copy of the order substituting you as plaintiff.

Please let me know if you have any questions for me in this regard.

Sincerely yours,

John M. Lamie

pma
Enclosures

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

ROBERT E. WICK
LAW OFFICES
THE CUMBERLAND-600 CUMBERLAND
BRISTOL, VIRGINIA 24203
MAILING ADDRESS:
POST OFFICE
DRAWER 8
TELEPHONE:
540-466-4488

January 24, 2000

John M. Lamie, Esquire
P O Box 519
Abingdon, VA 24212

In Re: Equipment Services, Inc.
Chapter 7, 237-98-04851-WSA

Dear John:

Judge Stone ordered the exchange of names of witnesses by January 31, 2000. I would appreciate your providing this information to Bob Copeland, with photocopies to me, at your very early convenience.

Likewise, I would appreciate your forwarding photocopies of all the exhibits to Bob Copeland, with photocopies to me, as this must be tendered to Mr. Copeland by February 4, 2000, pursuant to the enclosed order.

Very truly,

R.E. Wick

REW/cfs

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

John M. Lamie
Gerald F. Sharp
John M. Heuser
Please respond to the Abingdon Office

John J. Gifford
Scott S. Farthing
Eric Reese, Paralegal

March 8, 2000

Robert E. Wick, Trustee
PO Drawer 8
Bristol, VA 24203

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-WSA-7

Dear Bob:

I have talked with Dennis Dowdy concerning the allegation that the mine is flooded with the equipment in it. Mr. Dowdy has heard several "rumors" concerning this. One story is that the mine is flooded but that the equipment had been moved to higher ground in the mine and is safe; second, the mine and equipment are flooded; and third, the equipment was removed from the mine by a back entrance and sold.

I would suggest that Larry Akers be contacted and asked to investigate this situation.

Please let me know how you wish to proceed.

Sincerely yours,

John M. Lamie

PS- Dennis did confirm that men moved the equipment to a higher part of the mine before he shut down.

John

pma

xc: Ms. Loretta Dowdy

P.O. Box 850	P.O. Box 459	P.O. Box 519	P.O.Box 827
Grundy, VA 24614	Lebanon, VA 24266	Abingdon, VA 24212	Wytheville, VA 24382
540-935-5240	540-889-1182	540-628-6165	540-228-2119
Fax 540-935-7232	Fax 540-889-2215	Fax 540-628-4847	Fax 540-228-2032

Examples Of Valuable Services Provided By Debtors' Counsel

United States Trustee v. Garvey, 195 F.3d 1053, 1060 (CA9 1999): Court remands for determination of appropriate compensation for post-petition services rendered by attorney in Chapter 7 cases. Court explains that "[t]here are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate. * * * In this case, for example, [the debtor's attorney] filed the conversion petition, prepared schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicated with creditors, and participated in 2004 examinations. Interpreting the ambiguous provision in § 330(a)(1) so as to eliminate the possibility of post-petition compensation for Chapter 7 debtor's attorneys would significantly alter the ability of Chapter 7 debtors to secure counsel in order to perform these services - a fundamental change in bankruptcy law."

In re Tundra Corp., 243 B.R. 575, 581 (Bankr. D. Mass. 2000): In Chapter 11 non-DIP case converted to Chapter 7, court approves fees for debtor's counsel for work on business operations; case administration; fee/employment applications; financing; meeting of creditors; seeking relief from stay proceedings.

In re Crown Oil, Inc., 257 B.R. 531, 543-44 (Bankr. D. Mo. 2000): Court allows fees "for the purpose of alleviating hardship and for allowing reasonable fees likely to benefit the estate at the time the services and expenses were provided." Court notes that attorneys "negotiated a recovery for the estate shortly after the beginning of the case consisting of a ten percent interest in the oil wells from ResourceFund, which Watts described as the single largest asset in the estate. Both Watts and Deschenes provided services in compiling and assembling the Debtor's Schedules and Statements. Deschenes represented the Debtor in the § 341 meetings of creditors in the Chapter 11 case, and after conversion in the

Chapter 7 case. Watts provided the Chapter 7 Trustee with services, records, and information regarding possible preference actions against shareholders."

In re Office Prods. of Am., 136 B.R. 964, 974 (Bankr. W.D. Tex. 1992): Attorney's fees for debtor's counsel in Chapter 7 case upheld for services related to assisting trustee with operation of unusually complex business: "The trustee knew from the beginning that he needed to operate the debtor's stores at least for a short period of time to realize the value of the assets. These operations demanded the assistance of the debtor, including working with the debtor's pre-petition lender, because only the debtor was sufficiently familiar with both legal and operational problems associated with running office products warehouse-style retail outlets located in eastern states over 1500 miles from the situs of the trustee. With inventory to account for, sales tax to take care of, and employee benefits to attend to (including making arrangements for withholding not only for federal income taxes but also state income taxes), there were many special duties imposed on this debtor not normally required of the usual debtor in chapter 7. Any actual, necessary legal services rendered to the debtor relative to its performing these important duties are compensable." Ordinarily, however, chapter 7 debtor's attorney may be compensated only for "assisting the debtor in performing his legal duties" under Bankruptcy Code Section 521 and Bankruptcy Rule 4002.

In re Wash. Mfg. Co., 21 Bankr. Ct. Dec. 1345 (Bankr. M.D. Tenn. 1991): Court concludes that Chapter 11 debtor's counsel is entitled to reasonable compensation for time and expenses in preparing, presenting and defending fee application. *See also Smith v. Edwards & Hale, Ltd.*, 305 F.3d 1078, 1088 (CA9 2002), cert. denied, 71 U.S.L.W. 3721 (2003) ("The preparation of fee applications was necessary for the administration of the case and provided a direct benefit to the estate because those services aided the trustee in determining the allocation of administrative fees.").

In re TS Indus., Inc., 125 B.R. 638 (Bankr. D. Utah 1991): Chapter 11 debtor's counsel fee application. Court upholds fee requests for general estate administration, work on specific claims against the estate, and services rendered in preparing various business agreements.

In re Colorado-Ute Elec. Ass'n, 132 B.R. 174, 180 (Bankr. D. Colo. 1991): Chapter 11 debtor's counsel entitled to fees for work in rate cases before the public utilities commission, for representation in a jurisdictional dispute regarding the commission, as well as for representation relating to "general case administration, cash collateral, employee benefits, utilities deposits, the employment of professionals, Craig 3 lease issues, other lease issues, motions for relief from stay, Public Utilities Commission intervention, and the Office of Consumer Counsel intervention." Court also allows fees for time spent preparing fee application.

In re Stoecker, 114 B.R. 965, 971 (Bankr. N.D. Ill. 1990): Court awards compensation to Chapter 11 debtor's counsel "for services provided in connection with making court appearances and reviewing, drafting, editing and revising pleadings," for "time expended reviewing and assembling voluminous documents," and for time spent resolving discovery issues with trustee's counsel and creditors' counsel, since the debtor was "the sole equity holder in the corporate cases and was asserting his Fifth Amendment privilege."

In re Holden, 101 B.R. 573 (Bankr. N.D. Iowa 1989): "An attorney for the debtor is entitled to compensation for analyzing the debtor's financial condition; rendering advice and assistance to the debtor in determining whether to file a petition in bankruptcy; the actual preparation and filing of the petition, schedules of assets and liabilities, and the statement of affairs; and representing the debtor at the Section 341 meeting of creditors.'" (citations omitted).

In re Wash. Mfg. Co., 101 B.R. 944, 954 (Bankr. M.D. Tenn. 1989): Court upholds fee award to Chapter 11 debtor's

counsel based on time spent "on research, pleadings and memoranda concerning the appointment of a trustee," as well as for time spent on efforts "to protect the estate's assets in their communications with creditors, both secured and unsecured; in their representation of the debtors in labor negotiations and in a temporary restraining order action filed by the U.S. Department of Labor; and in their representation of the debtors in defense of a manager trainee who was criminally charged and arrested in Kentucky for the debtors' failure to pay pre-petition wages."

In re Brady, 20 B.R. 936, 955-56 (Bankr. N.D. Ohio 1982): Attorney for debtor in Chapter 7 proceeding entitled to recover legal fees for filing of initial bankruptcy petition. The Court concludes that "the attorney for the debtor is entitled to be paid a legal fee for the initial filing of the petition in bankruptcy out of the assets in this estate."

Examples Of Judges Scrutinizing Fee Applications

In re Top Grade Sausage, Inc., 227 F.3d 123, 132 (3d Cir. 2000): Chapter 11 debtor's counsel fee application denied. Court finds that "[a]fter a search of the record, we are unable to ascertain any particular action by the debtor's attorney that could not have been done by the Trustee and his staff."

In re Rheam of Indiana, 133 B.R. 325, 334-35 (E.D. Pa. 1991): Fee award to debtor's attorney in Chapter 7 proceeding reduced upon bankruptcy court's determination that legal questions in the case were "extremely simple," and therefore the hourly rate should be reduced to hourly rate for junior associate from hourly rate for senior partner. Fees also denied for appeals that bankruptcy court determined were not "necessary" to represent debtor's estate.

In re Hasset, 283 B.R. 376, 381 (Bankr. E.D.N.Y. 2003): Court denies in part fee application in Chapter 11 case converted to Chapter 7 case when compensation sought for "services that went beyond the typical statutory duties required of a debtor post-conversion."

In re Berg, 268 B.R. 250, 262 (Bankr. D. Mo. 2002): Court disallows fees when counsel should have realized that reorganization was infeasible and thus services did not benefit the estate, but awards some fees when attorneys' "services in compiling and assembling the Debtor's Schedules and Statements may have ultimately aided the Chapter 7 Trustee."

In re Crown Oil, Inc., 257 B.R. 531 (Bankr. D. Mo. 2000): Court disallows fees when counsel should have realized that reorganization was infeasible and had filed false certificate of service with the court.

In re Poseidon Pools of Am., 180 B.R. 718, 732, 736, 739-40 (Bankr. E.D.N.Y. 1995): Court lowers fee amount for Chapter 7 debtor's counsel, concluding that attorney's accounting of time was "woefully deficient in providing that level of information necessary for a meaningful evaluation."

Court also disallows fee award for unnecessary document retrieval. Finally, some services rejected as duplicative.

In re Waxman, 148 B.R. 178 (Bankr. E.D.N.Y. 1992): Chapter 7 proceeding. Court concludes that attorney for Chapter 7 debtor is not entitled to compensation out of bankruptcy estate for services rendered to defend debtor against creditor's objections to discharge and dischargeability of debt.

In re Ginji Corp., 117 B.R. 983, 992 (Bankr. D. Nev. 1990): Using very careful review of application for compensation by Chapter 11 debtor's counsel (debtor out of possession case), court reduces award for "general" and "tangential" research, explaining that in case in which trustee has been appointed, "the correct approach is not to disallow fees but to scrupulously inquire into such services so as to ascertain whether or not they were for the benefit of the estate or for some other interest." Court denies fees for services duplicative of trustee's or other attorneys' efforts.

In re Grabill, 110 B.R. 356 (Bankr. N.D. Ill. 1990): Chapter 7 proceeding converted to Chapter 11 (trustee appointed). Court concludes that debtor's counsel is not entitled to compensation from estate for time spent contesting expansion of trustee's power, to extent that such services were for benefit of prepetition management rather than estate. Court carefully reviews fee application and reduces two categories, while fees are awarded in full in three categories.

In re Holden, 101 B.R. 573, 576 (Bankr. N.D. Iowa 1989): Chapter 7 debtor's counsel fees denied for defending an objection to exemptions or discharge. Court notes that "courts have been fairly restrictive in their interpretation of what benefits the estate."

In re Moss, 90 B.R. 189 (Bankr. D.S.C. 1988): Chapter 7 debtor's counsel fees for time spent contesting Chapter 7 trustee's liquidation of one of debtor's assets benefited debtor, not estate, and thus, are not compensable from estate.

In re Rhoten, 44 B.R. 741 (Bankr. M.D. Tenn. 1984): Chapter 7 debtor's counsel fees compensation from debtors' estate not allowed for work of protecting debtors' discharge or exemptions.